IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. .....

THE SHAW-WALKER COMPANY, a corporation; and ROBERT B. HILLYARD and WALTER S. HILLYARD, doing business as Shine-All Sales Company, and LEAH B. WILSON,
Petitioners,

vs.

THE NATIONAL BENEFIT LIFE INSURANCE COMPANY, a corporation; and GILBERT A. CLARK and FRANK B. BRYAN, Jr., Receivers of The National Benefit Life Insurance Company, a corporation (appointed in Equity Cause No. 53,391),
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF JUSTICE RUTLEDGE, CONCURRED IN BY CHIEF JUSTICE GRONER AND ASSOCIATE JUSTICE STEPHENS, THREE OF THE MEMBERS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The opinion of the three above named Judges of the United States Court of Appeals for the District of Columbia (the other three Judges of the Court did not sit or participate in the hearing and disposition of this cause, although petitioners requested a hearing before a full bench, which was denied) is not yet officially reported, but the same is contained in the transcript of the record at pages 500-515. It was published in advance sheets, issue June 17, 1940, of the Federal Reporter (2d), at pages 497-510, and will be reported in 111 Fed. (2d), 426-434. It was also published in 68 Washington Law Reporter, 426-434.

The opinion of Justice Gordon, holding District Court, who decided the instant statutory dissolution suit (Equity 55,677), holding that the plaintiff (petitioner The Shaw-Walker Company) was entitled to a decree dissolving the defendant corporation (respondent Insurance Company), appointing receiver, granting injunctive relief, and decreeing that the Supreme Court of the District of Columbia (now District Court), Justice O'Donoghue presiding, had no jurisdiction of the subject-matter and that the appointment of Receivers Clark and Bryan, Jr., in the case of *John Randolph Pinkett v. The National Benefit Life Insurance Company,* corporation (Equity 53,391) was void, is contained in the transcript of record at pages 106-117, and is also published in 67 Washington Law Reporter, 125-128, issue, February 10, 1939. See his finding of facts (R. 118-129) and conclusions of law (R. 129-130).

The opinion of Justice O'Donoghue, in the *Pinkett* case, is contained in the transcript of record at pages 154-157. *He made no finding of facts or conclusions of law.*

II.

JURISDICTION.

The petition (*ante*, pp. 1-26) states the grounds on which the jurisdiction of this Court is invoked, to which reference is hereby respectfully asked.

III.

STATEMENT OF THE CASE.

A statement of facts and the status of the case are set forth in the accompanying petition at pages 27-35.

Repetition is not made here, but reference thereto is also respectfully asked.

IV.

SPECIFICATIONS OF ERRORS.

The United States Court of Appeals for the District of Columbia erred as follows:

(1) In overruling the timely motion of petitioners herein (appellees in the Court of Appeals) to dismiss the appeal taken by the custodian Receivers Clark and Bryan, Jr., which motion was consented to by said corporation.

(2) In holding that custodian Receivers Clark and Bryan, Jr., of the defendant insurance company, who were not parties to the instant statutory dissolution proceeding against said corporation (Equity 55,677), had the implied power, without leave of the Court, and without the authority or direction of the corporation, to note and perfect, in the names of said custodian Receivers and said corporation, an appeal to the United States Court

of Appeals for the District of Columbia from the decree of the District Court, dissolving said corporation in the case of *The Shaw-Walker Company, corporation, v. The National Benefit Life Insurance Company,* as sole defendant (Equity 55,677), as against a timely motion of the petitioners herein (appellees in said Appellate Court) to dismiss said appeal, to which motion the corporation, by its counsel, consented advising the Appellate Court that the said corporation did not desire to prosecute an appeal from the said decree dissolving said corporation.

(3) In denying petitioners the right under the due process clause of the Fifth Amendment to the Federal Constitution to have their cause heard and decided by a duly constituted Court of six Judges, rather than by three of the six Judges of the said Court; and in denying the motions timely made by petitioners in said Appellate Court for a hearing and/or rehearing before all of the Judges of said Court.

(4) In assigning only three Judges of said Court to hear and decide this case as against the several motions of petitioners (appellees) requesting that a full bench sit and decide the case.

(5) The opinion of Justice Rutledge, concurred in by Chief Justice Groner and Justice Stephens, contains the following errors:

(a) In failing to give proper effect to applicable decisions of this Court, namely:

Relfe v. Rundle, 103 U. S. 222.
Curran v. The State of Arkansas, 15 Howard 304.
Bernheimer v. Converse, 206 U. S. 516, 534.
Converse v. Hamilton, 224 U. S. 243, 256.
International Ins. Co. v. Sherman, 262 U. S. 346.
National Surety Co. v. Coreill, 289 U. S. 426.
Lovell v. St. Louis Mutual Life Insurance Co., 111 U. S. 264.
Carr v. Hamilton, 129 U. S. 252.

(b) In holding that the custody of receivers, appointed by decree of an equity court in an ordinary simple contract creditor's suit, of the property of an insolvent domestic corporation, is higher than the title to and right to possession of the property of such corporation of a statutory receiver of said corporation, appointed in a suit brought by a judgment-creditor against said corporation, pursuant to the provisions of a statute, to dissolve said corporation; and the said three Judges erred in not holding that the title and the right to possession of the assets of the corporation of the said statutory receiver are paramount to the possession of the equity custodian Receivers.

(c) In failing to hold that the right of creditors became fixed as of the date when a statutory proceeding is filed for the dissolution of an insolvent domestic corporation, and when the decree is entered decreeing that said corporation should be dissolved, a receiver of the corporation is appointed, the title of such statutory receiver and his right to possession of all of the assets of the insolvent corporation are paramount to the possession by mere custodian receivers of the corporation, who were appointed in a simple contract creditor's suit; and in failing to hold that the statutory dissolution proceeding, when final decree is entered dissolving the corporation, supersedes the existing simple contract creditor's suit.

(d) In deciding that Justice O'Donoghue (holding the Supreme Court of the District of Columbia, now District Court) had jurisdiction to enter decrees dated February 29, 1932, and April 8, 1932, respectively, and other decrees, in the case of *John Randolph Pinkett v. The National Benefit Life Insurance Co.,* corporation (Equity 53,391), appointing Clark and Bryan, Jr., permanent receivers of said corporation, and authorizing and direct-

ing them to carry on the life insurance business of said Insurance Company, *in insolvency,* in the District of Columbia, and elsewhere throughout the United States, and to modify contracts of life insurance with existing policyholders of said insolvent insurance company, and also when said receivership itself was insolvent, and as against the rights and interests of non-assenting policyholders and other creditors of the insolvent company, the Receivers using the assets of the insolvent company to carry on said life insurance business.

(e) In not holding that the proceedings in the aforesaid *Pinkett* case were void for lack of jurisdiction of the Court of the subject-matter of the *Pinkett* bill of complaint (Equity 53,391).

(f) In reversing the decree of Justice Gordon (holding District Court) in this statutory proceeding (Equity 55,677), dissolving said Insurance Company, appointing a receiver thereof, awarding injunctive relief against Clark and Bryan, Jr., receivers in the *Pinkett* case, and decreeing that the proceedings in the *Pinkett* case (Equity 53,391) were void.

V.

SUMMARY OF ARGUMENT.

1. The said Court of Appeals should have granted motion of petitioners (appellees) to dismiss the appeal.

2. A hearing and a decision by only three of the six Judges of the said Court of Appeals as against a timely motion for hearing before a full bench, is not a hearing and decision of that Court, but a nullity. Less than a majority of said Court is not a quorum.

3. The opinion of the three Judges (the other three

Judges of the Court did not sit or participate in the hearing or decision) fails to give proper effect to eight decisions of this Court, applicable to the instant case, heretofore and hereinafter cited. It conflicts with two decisions of other Circuit Courts of Appeals, and with three decisions of the said United States Court of Appeals for the District of Columbia, heretofore and hereinafter referred to.

4. The title of a receiver of an insolvent domestic corporation, appointed in a statutory dissolution suit, brought by a judgment-creditor against the corporation, as sole defendant, to all of the property of the corporation, is paramount to the possession of the property of such corporation of two receivers appointed in a simple contract creditor's suit against the corporation.

5. The rights of creditors in a statutory suit for the dissolution of a corporation become fixed as of the date of the filing of the bill, and when decree is entered dissolving the corporation such decree supersedes the pending equity receivership case previously brought by a simple contract creditor.

6. A court of equity is without jurisdiction, in a simple contract creditor's suit brought against a hopelessly insolvent life insurance company incorporated under the laws of the District of Columbia, to enter decree appointing receivers of the corporation with authority and direction to operate, manage and control the life insurance business of the insolvent corporation in the District of Columbia and elsewhere throughout the United States, or to conduct a life insurance business, in insolvency. Such decrees are void.

VI.

ARGUMENT.

1.

THE SAID COURT OF APPEALS SHOULD HAVE GRANTED THE MOTION OF PETITIONERS (APPELLEES), TO DISMISS THE APPEAL FOR THE FOLLOWING REASONS:

(a) Because the corporation, although served with process in this dissolution suit, did not file a corporate answer and oppose a decree of dissolution;

(b) Because the custodian Receivers, who appeared in said dissolution suit, stipulated, by their counsel, with counsel for plaintiff, as to the correctness of the essential allegations of the bill (R. 19-22).

(c) Because at the final hearing, said custodian Receivers, by their counsel, in open court, conceded that the plaintiff was entitled to a decree of dissolution of the corporation (R. 37, 80).

(d) Because the corporation, or its counsel, did not note an appeal or sign the appeal bond (R. 210), or authorize the custodian Receivers, who were not parties to the dissolution suit, to note an appeal in its behalf.

(e) Because the custodian Receivers did not obtain an order of court, either in the dissolution suit or in the equity suit in which said custodian Receivers had been appointed, granting leave, or instructing said Receivers to appeal from the dissolution decree.

(f) Because when the appeal was docketed in the United States Court of Appeals for the District of Columbia, the petitioners herein (appellees) filed (R.

425-430) a timely motion in said Appellate Court to dismiss the appeal, to which motion the corporation, by its counsel entered special appearance (R. 438) and consented to said motion, advising the Court that the corporation did not desire to prosecute the appeal (R. 462-3); and

(g) Because the President of the corporation, after the custodian Receivers caused said appeal to be docketed in the Appellate Court, wrote a letter to the Receivers advising that said corporation did not desire to prosecute said appeal and directing them to abandon the same (R. 472).

The legal existence of a corporation is not cut short by its insolvency and the consequent appointment of a Receiver. *Chemical National Bank v. Hartford Deposit Co.*, 161 U. S. 1, 7, 8, 9. A decree appointing a Receiver for a corporation will not work its dissolution, *Coy v. Title Co.*, 313 Fed. 595, affirmed, 320 Fed. 90.

Neither the insolvency of a corporation nor the circumstances which usually attend an insolvency, such as the appointment of a Receiver, will work a dissolution of the corporation, so as to disable it from exercising its corporate powers. *Pondville Co. v. Clark*, 25 Conn. 97.

In *Brown v. Delafield and Baxter Cement Co.*, 1 App. Cas. D. C. 232, the Court says that "The authorities are practically unanimous to the effect that a corporation does not lose its franchise or become legally dissolved by discontinuing its business, ceasing to maintain an office or to elect officers, or by becoming hopelessly insolvent."

Notwithstanding the appointment of a Receiver, the corporate identity is preserved, *Bethel Natl. Bk. v. Pahquioque Natl. Bk.*, 14 Wallace, 383, until its dissolution is effected by the termination of its existence in law or

in fact. The appointment of a Receiver of a corporation does not involve a consideration of any question whatever which might arise in a suit instituted directly for the purpose of dissolving the corporation. *Kincaid v. Dwinnelle,* 37 N. Y. Super. Ct. 326, 331, affirmed 59 N. Y. 548.

CUSTODIAN RECEIVERS, NOT PARTIES TO SUIT, COULD NOT APPEAL.

Where a party appealing was not a party to a suit, nor does it appear that he ever asked to be made a party, his application for an appeal will be denied. *Ex parte Cockcroft,* 104 U. S. 578.

No persons but those appearing to be parties *on the record* can be permitted to be heard on an appeal or writ of error, *Harrison v. Nixon,* 9 Peters 483, 484; *Elwell v. Fosdick,* 134 U. S. 500; *Connellsville etc. R. Co. v. Baltimore,* 154 U. S. 553.

It is a well settled maxim of the law that "no persons can bring a writ of error to reverse a judgment who is not a party or privy to the record." A writ of error lies when a man is grieved by an error in the foundation, proceeding, judgment, or execution in suit. *Boyle v. Zacharie,* 6 Peters 655; *Bayard v. Lombard,* 9 How. 536.

In ejectment, the tenant in possession having neglected to appear and have herself made a defendant in the Court below cannot have a writ of error to the judgment against the casual ejector. *Connor v. Peugh,* 18 How. 374.

And it is well settled that no one can bring up as plaintiff in a writ of error the judgment of an inferior court to a superior one unless he was a party to the judgment in the Court below; nor can anyone be made a defendant in a writ of error who was not a party to the judgment in the inferior court. *Payne v. Niles,* 20 How. 219.

Where in a suit for the foreclosure of a mortgage, the mortgagee is satisfied with the decree as entered, the mortgagor cannot appeal from the decree of foreclosure. *Indiana Southern Ry. Co. v. Liverpool, etc., Ins. Co.*, 109 U. S. 168.

The decree in the instant statutory proceeding being for the dissolution of the defendant corporation, Clark and Bryan have no legal or equitable interest in the controversy. In *Basket v. Hassel*, 107 U. S. 602, the Court held that persons who have no legal interest, either in maintaining or reversing a decree, are not necessary parties to the appeal. See, also, *Cox v. United States*, 6 Peters 181, 182; *Germaine v. Mason*, 12 Wall. 259, 261; *Simpson v. Greely*, 20 Wall 152.

An appeal by an administrator *de bonis non* is irregular unless he is first made a party in the Court below, either upon his own application or that of the complainants according to the rules and practice in chancery proceedings. *Taylor v. Savage*, 1 Howard 282.

The suing out of a writ of error is the beginning of a new suit. *Sholty v. McIntyre*, 139 Ill. 171.

In *State ex rel. Cassedy v. Interstate Fisheries Co.*, 78 Pac. (Wash.) 202, the Court held that a receiver, removed, had no right of appeal, no matter how much the receiver may have felt aggrieved at the action of the Court in removing him. The Court said: "But whether he personally shall or shall not continue as receiver is a question he has no right to litigate."

In the following cases the receivers were denied the right of appeal: *Coffey v. Gay*, 67 So. (Ala.) 681; *McKinnon v. Wolfenden*, 47 N. W. (Wis.) 436; *Cobbs, Receiver v. Vizand, Inc.*, 62 Ala. 730; *Chicago Tile Co. v. Caldwell*, 58 Ill. 219.

In *Screven v. Clark*, 48 Ga. 41, the Court said that the foundation of the rule is that it is always for the Court itself to determine whether it shall be "dragged into litigation."

In *Louisville & St. L. Consolidated R. R. Co. v. Surwald,* 37 N. E. 909, it was held that as a general rule the writ of error should be sued out in the same names in which the proceeding in the Circuit Court was conducted; that although there had been a consolidation of the party of record with the one seeking to appeal, the right of appeal was denied.

A third person cannot take an appeal in the name of the party to the decision merely because it may affect his interest adversely. *Colman v. West Va. Coal Co.,* 25 W. Va. 148; *McIntyre v. Sholty,* 143 Ill. 17.

In *ex parte Dorr,* 3 Howard, 104, the Court held that a writ of error cannot be prosecuted at the instance of next friend for the benefit of a party to the record without his consent.

In *Irwin v. Armuth,* 129 Ind. 340, the Court held that a mere *amicus curiae* appearing in the trial court proceeding cannot appeal from any decision in the case, even though the trial court may have allowed him to introduce evidence for his own benefit. See, also, *Martin v. Tayley,* 119 Mass. 116.

In *Dalbkermeyer v. Scholtes,* 3 S. D. 124, the Court held that "an appeal will be dismissed when it is shown by satisfactory evidence that it was or is being prosecuted without authority, and against the desire or wish of the appellant."

Creditors of an unsuccessful party cannot appeal from the judgment against them. *Sherrer v. Collins,* 17 N. J. L. 181; *Clapp v. Ely,* 27 N. J. L. 555; *Evans v. Adams,* 15 N. J. L. 373. If Clark and Bryan, receivers, claim that they represent creditors of the defendant corporation, administering the affairs of that company in the *Pinkett* case, and that they have been superseded in the instant dissolution suit by another receiver, said Clark and Bryan have no right of appeal in this case.

A receiver cannot appeal from an order removing him unless he is a party to the action in